Opinion on European Service Regulation

Yesterday, Advocate General *Trstenjak* delivered her opinion in case C-14/07 (*Weiss und Partner*).

The background of the case was as follows: The Chamber of Industry and Commerce Berlin (*Industrie- und Handelskammer Berlin*) sued Nicholas Grimshaw & Partners Ltd. for damages under a architect contract. The parties had agreed in this contract that correspondence was to be conducted in German. The defendant was served with a statement of claim as well as annexes which were drafted in German. After Grimshaw had refused acceptance of the statement of claim and the annexes, Grimshaw was served with an English translation of the statement of claim and annexes written in German without an English translation. Subsequently, Grimshaw referred to Art. 8 (1) Service Regulation (Regulation (EC) No 1348/2000) and refused to accept the documents due to the fact that the annexes had not been translated into English. After the appeal of Grimshaw against an interim judgment of the Regional Court (*Landgericht*) Berlin declaring the claim having been served properly was refused by the Court of Appeal (*Kammergericht*) Berlin, the third party (Weiss and Partner GbR) appealed to the Federal Supreme Court (*Bundesgerichtshof*).

Since the *Bundesgerichtshof* had doubts on the interpretation of Regulation (EC) No 1348/2000, it referred **the following questions** to the ECJ for a preliminary ruling:

> *Must Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('the Regulation') be interpreted as meaning that an addressee does not have the right to refuse to accept a document pursuant to Article 8(1) of the Regulation if only the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands?*
>
> *If the answer to the first question is in the negative:*
>
> *Must Article 8(1)(b) of the Regulation be interpreted as meaning that the*

addressee 'understands' the language of a Member State of transmission within the meaning of that regulation because, in the exercise of his business activity, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission?

If the answer to the second question is in the negative:

Must Article 8(1) of the Regulation be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of such annexes to a document, which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, if the addressee concludes a contract in the exercise of his business activity in which he agrees that correspondence is to be conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language?

Advocate General *Trstenjak* recommended in her **opinion** that the ECJ should decide in the following way:

With regard to the **first question,** the Advocate General suggests that Art. 8 (1) Service Regulation should be interpreted as providing in case of the service of a document including annexes a right of the addressee to refuse acceptance pursuant to Art. 8 (1) Service Regulation also in cases where only the annexes to the document to be served have not been written in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands.

In respect of the **second question**, the Advocate General recommends that Art. 8 (1) b) Service Regulation should be construed in this sense that there exists a refutable presumption that the addressee of a document understands the language of a Member State of transmission in terms of this Regulation if he agrees contractually in the exercise of his business activity that correspondence between the contracting parties on the one side and with authorities and public institutions of the Member State of transmission on the other side is conducted in the language of this Member State of transmission. However, since this constitutes only a refutable presumption, the addressee can refute this presumption under the rules of evidence of the Member State where the lawsuit

is conducted.

In regard to the **third question**, the Advocate General submits that Art. 8 (1) Service Regulation should be interpreted as not granting a right to the addressee to refuse the acceptance of annexes to a statement of claim which are not drafted in the language of the Member State addressed, but in the language which has been agreed upon contractually between the parties in the exercise of their business activity for correspondence with authorities and public institutions of the Member State of transmission, if he concludes a contract in excercise of his business activity and agrees that correspondence with authorities and public institutions of the Member State of transmission is conducted in the language of this State and if the transmitted annexes concern this correspondence and are drafted in the agreed language.

(Approximate translation from the German version of the opinion available at the ECJ website.)

See for the full opinion (in German, French, Spanish, Estonian, Dutch, Slovene, Finnish and Swedish) and the reference the website of the ECJ. The referring decision can be found (in German) at the website of the Bundesgerichtshof.

Supreme Court of Canada to Hear Forum Non Conveniens Appeal

The Supreme Court of Canada has just granted leave to appeal in *Teck Cominco Metals Ltd. v. Lombard General Insurance Company of Canada* (also indexed as *Lloyd's Underwriters v. Cominco Ltd.*), a decision of the British Columbia Court of Appeal (available here).

In British Columbia the insurance companies each sought a declaration that they did not have to defend or indemnify Teck Cominco in respect of environmental damage claims. Teck Cominco moved to stay those proceedings, primarily on the basis that related litigation was already underway in the State of Washington,

USA. The motion was denied and that decision was upheld on appeal, such that the British Columbia proceedings could proceed.

It is unusual for the Supreme Court of Canada to agree to hear an appeal about the most appropriate forum for the resolution of a dispute. As is its practice, the court did not provide any reasons for its decision to grant leave. The court may be wanting to address the role of comity in stay motion cases where there has been a prior positive assertion of jurisdiction by a foreign court.

Rome I: EP Adopts Legislative Resolution at First Reading

As reported in our previous post, **the EP's plenary session adopted** today in Brussels, **at first reading, a legislative resolution on the Rome I Proposal**. While largely based, as regards the conflict rules, on the draft legislative resolution contained in the report voted by the JURI Committee on 21 November 2007, the EP's final text is the result of some further amendments filed jointly by all the EP political groups before the plenary's vote.

Three of these last-minute amendments are worth mentioning:

– a new Art. 7 provides a **conflict rule on insurance contracts** (the issue has been discussed at length in the Council's Committee on Civil Law Matters: see doc. n. 8935/1/07 of 4 May 2007);

– a third paragraph is added to Art. 9 on **overriding mandatory provisions**:

> ***Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed****, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

– as a result of the introduction of the provision on insurance contracts, **Art. 20 on the exclusion of renvoi is redrafted** as follows:

> *The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law,* ***unless provided otherwise in this Regulation****.*

A provisional edition of the Rome I legislative resolution is available in the collection of the texts adopted by the EP in the session (see p. 73 ff.). Further information will be provided, as soon as the minutes of the sitting are available.

Second Judgment on Brussels II bis Regulation

Today, the ECJ delivered its second judgment on the Brussels II *bis* Regulation (C-68/07, *Sundelind Lopez*).

The case was referred to the ECJ by the Swedish Supreme Court (*Högsta Domstolen*) asking for a preliminary ruling on the **following question**:

> *The respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State. May the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of the Brussels II Regulation], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?*

The **ECJ now held:**

> ***Articles 6 and 7 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as***

> ***amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, as regards treaties with the Holy See, are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.***

See for the full judgment the website of the ECJ. See further also our previous post on the reference which can be found here.

Choice of law, forum non conveniens and asbestos in the Victorian Court of Appeal

In Australia, the applicable law in negligence cases is the law of the place of the tort: *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10. On a number of occasions in recent years, Australian courts have dealt with difficult choice of law issues arising out of negligent omissions, asbestos-related injuries and overseas plaintiffs: see, eg, *James Hardie Industries v Hall* (1998) 43 NSWLR 554; [1998] NSWSC 434; *James Hardie Industries v Grigor* (1998) 45 NSWLR 20; [1998] NSWSC 266; *Amaca Pty Ltd v Frost* [2006] NSWCA 173.

In *Puttick v Fletcher Challenge Forests Pty Ltd* [2007] VSCA 264, the Victorian Court of Appeal recently considered the related question of whether Victoria was *forum non conveniens* for an action in which the Victorian-resident plaintiff sued the New Zealand-incorporated holding company, Fletcher, of his former New Zealand-incorporated employer for negligence in relation to his exposure to

asbestos in factories in Belgium and Malaysia which the plaintiff visited at the direction of his employer. At the relevant time, the plaintiff was resident in New Zealand and was employed there.

In accordance with the High Court's decisions in *Zhang* and *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; [1990] HCA 55, a stay of proceedings on the grounds of *forum non conveniens* would only be granted if Victoria was a 'clearly inappropriate forum'. This is a more difficult test to satisfy than showing that another forum is a 'more appropriate forum': cf *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460. The first instance judge concluded that many witnesses and relevant documents would be located in New Zealand, but that this, of itself, did not mean that Victoria was a clearly inappropriate forum. However, his Honour then concluded that the applicable law was that of New Zealand and that this, taken with the other factors, meant that Victoria was a clearly inappropriate forum. The key issue on appeal was whether New Zealand law applied.

A 2:1 majority of the Court of Appeal (Warren CJ and Chernov JA; Maxwell P dissenting) agreed with the trial judge that New Zealand law did apply and, accordingly, that Victoria was *forum non conveniens*. The negligence asserted by the plaintiff was that Fletcher: (1) caused or permitted him to be exposed to asbestos in Belgium and Malaysia; (2) failed to provide and maintain a safe system of work for him whilst he was working in Belgium or Malaysia; and (3) failed to warn or instruct him or his employer about the need for protective clothing and equipment whilst working with or exposed to asbestos dust.

The majority considered that each of these acts occurred in New Zealand, there being no act or failure to act in Belgium or Malaysia to which the plaintiff could point which constituted an alleged wrong. Any action which Fletcher should have taken (eg to give further warnings or instructions) would have been taken in New Zealand, and the instructions to visit Belgium and Malaysia were given by the employer and received by the plaintiff in New Zealand.

In contrast, the minority characterised the plaintiff's complaint as having been exposed to unsafe workplaces in Malaysia and Belgium. Fletcher's conduct in New Zealand created the risk of harm to the plaintiff, but that risk did not assume significance (i.e. the negligent conduct was not completed) until the plaintiff was exposed, without warning or protection, to asbestos in Malaysia and Belgium.

Both the majority and the minority sought to argue that their respective positions were supported by the cases mentioned above in which Australian courts have previously considered similar issues. Ultimately, cases such as *Puttick* exemplify the difficulties associated with locating the place of the tort in cases of negligent omission. It remains to be seen whether the plaintiff will seek special leave to appeal this decision to the High Court.

New Site on Comparative Conflicts

The Section on *Private International Law* of the French Society of Comparative Legislation has now its own website.

The new site will report on recent developments of comparative conflicts. The editors are French academics and foreign (i.e. non French) correspondants from European civil law jurisdictions. It seems that the French editors will report in French, while the foreign editors may report in English. German professor Jurgen Basedow and German scholar Simon Schwarz have reported several times on German developments in English (see below).

Conflict of laws welcomes this new site dedicated to comparative conflicts!

Law Governing Name in German Conflicts

German professor Jurgen Basedow and German scholar Simon Schwarz have reported in English on the new site of the Section of *Private International Law* of the *Society of Comparative Legislation* on a statutory intervention amending the German choice of law rule with regard to name.

The new provision (art. 47 of the Introductory Law to the German Civil Code – *EGBGB*) and the report can be found here.

New German Authority for International Legal Relations

The report of Basedow and Schwarz is here.

Arresting a person for civil jurisdiction found unconstitutional by Supreme Court of Appeal of South Africa

In Bid Industrial Holdings (Pty) Ltd v Strang and another [2007] SCA 144 (RSA) the Supreme Court of Appeal of South Africa has ruled on 23 November 2007 that arresting a person in order to found or confirm (civil) jurisdiction is unconstitutional. Under South African law, when a person not domiciled in South Africa is sued in a South African court, the court's jurisdiction had to be confirmed either by attachment of property or arrest of the person, unless the foreign defendant submitted to the jurisdiction of the court. The part of this rule permitting the arrest of a person has now been found to infringe the rights to freedom and security of the person, equality, human dignity, freedom of movement, and possibly also the right to a fair civil trial. It could not be said that the rule provided a justifiable limitation to these fundamental rights. The Court stated that arresting a defendant was a profound infringement and had the effect

of coercing him or her to submit to the jurisdiction of the court, to make prompt payment, or to provide security.
The Supreme Court of Appeal abolished the rule and adopted a replacement rule to the effect that where attachment was not possible to found or confirm jurisdiction, the South African courts will have jurisdiction if summons is served on the defendant while he or she is in South Africa and there is sufficient connection between the suit and the area of the court.

First ECJ Judgment on Brussels II bis

Today, the ECJ delivered its first judgment on the Brussels II *bis* Regulation (C-435/06, *Applicant C*).

The Finnish *Korkein Hallinto-oikeus* had referred the **following questions** to the ECJ for a preliminary ruling:

> *1. (a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels 11a Regulation) apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;*
>
> *(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;*
>
> *(c) and, in the latter case, is the Brussels IIa Regulation applicable to a decision on placement contained in one on taking into custody, even if the decision on custody itself, on which the placement decision is dependent, is subject to legislation, based on the mutual recognition and enforcement of judgments and*

administrative decisions, that has been harmonised in cooperation between the Member States concerned?

2. If the answer to Question 1(a) is in the affirmative, is it possible, given that the Regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into custody of a child?

3. If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does the Brussels IIa Regulation apply temporally to a case, taking account of Articles 72 and 64(2) of the regulation and the abovementioned harmonised Nordic legislation on public law decisions on custody, if in Sweden the administrative authorities took their decision both on immediate taking into custody and on placement with a family on 23.2.2005 and submitted their decision on immediate custody to the administrative court for confirmation on 25.2.2005, and that court accordingly confirmed the decision on 3.3.2005?

The **Court** now held with regard to **Question 1 (a)**:

Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

With regard to the first question, the Court examined first, whether a decision which orders the immediate taking into care of a child relates to parental

responsibility (para. 25 et seq.). Here the Court held that the fact that the taking of a child into care is not explicitly listed in Art. 1 (2) of the Regulation cannot lead to the exclusion of these matters from the scope of the Brussels II *bis* Regulation (para. 28 et seq.). According to the Court, the wording of Art. 1 (2) ("in particular") shows that the provision has to be understood as a guide and is not exhaustive (para. 30). Further, this point of view is supported *inter alia* by Recital 5 in the Regulation's preamble according to which "all decisions on parental responsibility, including measures for the protection of the child" shall be covered (para. 31). Secondly, the Court examined whether a decision ordering the immediate taking into care and placement of a child which was adopted in the context of rules of public law constitutes a "civil matter" in terms of Art. 1 (1) Brussels II *bis*. In this respect the Court stressed that the term of "civil matters" has to be interpreted in view of the objectives of the Regulation which would be impaired, were decisions to be excluded from the Regulation only because they are governed by public law in some Member States (para. 45). Thus, the term of "civil matters" has to be interpreted autonomously (para. 46).

In respect of **Question 2** the Court held:

> ***Regulation No 2201/2003, as amended by Regulation No 2116/2004, is to be interpreted as meaning that harmonised national legislation on the recognition and enforcement of administrative decisions on the taking into care and placement of persons, adopted in the context of Nordic Cooperation, may not be applied to a decision to take a child into care that falls within the scope of that regulation.***

Here the Court emphasised that Art. 59 (2) (a) Brussels II *bis* constitutes the only exception from the general rule of Art. 59 (1) Brussels II *bis*, according to which the Regulation supersedes conventions concluded between the Member States regarding matters governed by the Regulation and that this exception has to be interpreted strictly (para. 60).

Regarding **Question 3** the Court held:

> ***Subject to the factual assessment which is a matter for the national court alone, Regulation No 2201/2003, as amended by Regulation No 2116/2004, is to be interpreted as applying ratione temporis in a case such as that in the main proceedings.***

In respect of this last question the Court referred to Art. 64 and Art. 72 Brussel II *bis*, which show that the Regulation applies in principle only to legal proceedings instituted after its date of application, i.e. 1 March 2005 (para. 68). However, Art. 64 (2) of the Regulation provides that judgments given after the date of application of Brussels II *bis* in proceedings instituted before that date but after the entry into force of the Brussels II Regulation (Regulation 1347/2000) shall be recognised and enforced in accordance with the provisions of Chapter III of Brussels II *bis* if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Brussels II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. According to the Court, these requirements are, subject to factual assessment which is a matter for the national court, met in the present case (para. 77).

See for the reference, the opinion and the full judgment the website of the ECJ and for the background of the case also our previous post on Advocate General Kokott' s opinion which can be found here.